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No. 07-1208

IN THE
SUPREME COURT OF THE UNITED STATES

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**JOHN SLAGTER,**

*Petitioner,*

**V.**

**STONECRAFT, LLC,**

*Respondent,*

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On Petition a For Writ of Certiori To The
United States Court of Appeals For The
Fifth Circuit

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# BRIEF IN OPPOSITION

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## INTRODUCTION

The instant Petition for Writ of Certiori is a continuation of an eight year dispute concerning ownership of a patent. The dispute has a long and tortured history and has spawned a legal cornucopia of issues, most of which are only remotely related to the ownership issue. Through the years, the involvement of five different courts has narrowed the issues to the questions Petitioner presents - whether a party may consent to entry of final judgment by a non-Article III adjunct court and, if so, whether that consent must be express or may be implied.

This Court has held that statutory provisions providing for consent to entry of a final judgment by an adjunct court are constitutional, has expressly condoned the consent statute in the bankruptcy context and has held that consent may be implied from a party's conduct. There is no reason to grant certiori in this case.

## STATEMENT OF THE CASE

Slagter solicited investments from a group of individuals to form Stonecraft, LLC. The business purpose of the Company was to develop a fiber reinforced flexible concrete tile and to manufacture it in an area in need of jobs. USCA5 693 Stonecraft was organized as a Michigan Limited Liability

Company in November, 1995. It was a "manager operated" company and Slagter was designated as the manager. After encountering problems with the fiber-based product, Slagter recommended the Company not pursue the fiber based product and suggested developing a polymer-cement composite. USCA5 275, 1208.

In early 1998, Slagter hired Dr. Dale DeFord, who holds a Doctorate in Material Science, to solve problems encountered in developing the polymer-cement composite. USCA5 277 Dr. DeFord conducted experiments which resulted in a chemical composition that eliminated the problems. USCA5 276-281 In late 1998 and early 1999, Dr. DeFord prepared a draft of a patent application for the Company to file with the United States Patent and Trademark Office ("USPTO"). Since the USPTO does not allow a patent application to be filed in the name of a business entity, Slagter directed DeFord to designate Slagter as the inventor. A Patent was subsequently issued.

In 1999, Stonecraft leased a manufacturing facility from Sharkey County, Mississippi, an impoverished county in the Mississippi Delta, and moved its manufacturing operations to Sharkey County. By late 1999, after investment by the members (other than Slagter) of millions of dollars in capital and after millions of dollars of loans

guaranteed by the United States Government, Stonecraft still had not produced any product on a commercial basis. USCA5 695 The Company was dysfunctional. It became apparent to the other members that Slagter did not have the technical and managerial skills necessary to run the Company. Slagter was offered a position as "founder" with another to be hired to manage the Company. Slagter refused. In early June, 2000, the members terminated Slagter as the manager of the Company.

Shortly thereafter, Slagter asserted, for the first time, that he was the exclusive owner of the Patent and refused to execute an assignment of the Patent to Stonecraft. In September, 2000, Slagter put Stonecraft and its lenders on notice that it had no rights to manufacture or sell the product. As a result, Stonecraft was unable to obtain any additional financing. USCA5 593

In October, 2000, Stonecraft filed a complaint in state court against Slagter for a declaratory judgment (i) as to the ownership of the Patent, (ii)to compel Slagter to assign the Patent, (iii)for a declaratory judgment that Slagter's equity interest in Stonecraft should not be increased and (iv)for damages for unauthorized use of Stonecraft property, funds, and employees. In July, 2001, Slagter filed a counterclaim against Stonecraft for wrongful termination and for indemnification. Numerous

discovery disputes ensued between the parties and there were several failed attempts to settle.

While the state court action was being litigated, some of the members personally borrowed approximately $3,000,000.00 which they in turn loaned on an unsecured basis to Stonecraft. USCA5 705 However, these funds were exhausted and by 2003, Stonecraft was in default on its lease obligations to Sharkey County and on the government guaranteed loans made by the Bank of Anguilla, Enterprise Corporation of the Delta and South Delta Planning and Development District. USCA5 594 The Company's lawyers took a judgment for unpaid attorneys fees against the Company in state court.[1] With the financing from the other members being exhausted, Stonecraft determined that it should seek bankruptcy protection.

On March 18, 2003, Stonecraft filed a Chapter

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[1] Slagter suggests that a statement in the state court's opinion precipitated the bankruptcy filing for the purpose of selecting a different forum to litigate the Patent dispute. While the judgment was entered in the same court, the statement was made by a different judge than that assigned to the state court patent dispute. In any event, Slagter was not a party to that collection action by Stonecraft's attorneys and the issue was neither litigated nor necessary to the attorney's fee dispute. There is no collateral estoppel or res judicata effect to the statement in the state court's opinion as to ownership of the Patent.

11 Proceeding. In August, 2003, Stonecraft filed its adversary proceeding against Slagter to determine ownership of the Patent. The adversary proceeding was mediated on several occasions beginning in November, 2003 and continuing into 2004, but no settlement was reached.

In April, 2004, Stonecraft filed an Amended Complaint against Slagter. Shortly thereafter, Slagter substituted new counsel, Steve Skahn, a very capable and experienced Michigan trial lawyer. The Amended Complaint sought (i) turnover of all interests of Slagter in the Patent pursuant to §542 of the *Bankruptcy Code* (Count I), (ii) an imposition of a constructive trust upon the Patent (Count II) and (iii) authority to sell the Patent pursuant to § 363(h) of the *Bankruptcy Code* (Count III).[2]

In response, Slagter filed a motion to dismiss Counts I and III pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure* and to abstain as to Count II pursuant to 28 U.S.C. § 1334 (c). Slagter's primary argument was that it would be inefficient for the parties to "start over" in the adversary proceeding

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11 U.S.C. § 363(h) authorizes a bankruptcy debtor to sell its interest in property that is jointly owned with another on certain conditions. Rule 7001 of the *Federal Rules of Bankruptcy Procedure* requires an adversary proceeding to compel such a sale.

after so much discovery had been completed in the state court action. Slagter also argued that **"Any decision of this Court would be subject to review, before becoming final, by the district court."**

The motion was argued on July 12, 2004. Stonecraft agreed that all discovery in the state court action could be used in the adversary proceeding and that Stonecraft would travel to Michigan for trial depositions of Slagter's witnesses. On August 5, 2004, the Bankruptcy Court denied Slagter's motion.

Three weeks later, Slagter filed a counterclaim in the adversary proceeding asserting that in the event the Bankruptcy Court found Stonecraft to be the owner of the Patent, the Court should not require Slagter to turnover the Patent because of alleged willful and oppressive conduct of the other members of Stonecraft. USCA5 286 Slagter's counterclaim was a purely state law claim based upon §450.4515 of the *Michigan Limited Liability Act*, which provides certain remedies when the managers or members in control engage in illegal, fraudulent or willfully unfair and oppressive conduct toward one of the other members. **The counterclaim expressly requested the Bankruptcy Court to enter judgment in favor of Slagter.**

Slagter requested time for discovery and time to file a motion for summary judgment. The parties

entered into an agreed scheduling order setting deadlines for completion of discovery, dispositive motions and setting the trial for January 18, 2005. In October, November and December, 2004, eight depositions were taken in Illinois and Michigan.

On November 19, 2004, Slagter filed a Motion for Summary Judgment. **Again, Slagter requested the Bankruptcy Court to enter judgment in his favor.** There was no suggestion that the Bankruptcy Court should submit proposed findings of fact and conclusions of law to the District Court. In December, 2004, a 30 page pre-trial order was agreed upon by the parties. USCA5 260 The trial was conducted on January 18 through 21, 2005. During the trial, thirteen witnesses testified, including four expert witnesses. Also, almost 250 documents were admitted into evidence.

On March 10, 2005, the Bankruptcy Court issued an Opinion in which it held that (i) the overwhelming weight of the evidence proved that Slagter occupied a fiduciary relationship to Stonecraft, (ii) the Patent was developed at the expense of Stonecraft, (iii) the product was essential to the business purpose of Stonecraft, (iv) Slagter led the members to believe that the Patent belonged to Stonecraft and (v) Slagter held title to the Patent only as a trustee pursuant to §450.4404 of the *Michigan Limited Liability Act*. In addition, the Bankruptcy

Court held that Slagter did not invent the polymer-cement composite prior to the formation of the Company. The Bankruptcy Court found that it was Dr. DeFord, not Slagter, who developed the exact ingredients and the ratios that made up the chemical composition for flexible concrete tile. USCA5 259

**Counsel for Slagter and counsel for Stonecraft agreed that the Bankruptcy Court would enter a final judgment from which Slagter's appeal time would run.** However, counsel could not agree upon the form of the final judgment. On April 8, 2005, Stonecraft filed a Motion for Entry of Final Judgment. Slagter did not file a written response to Stonecraft's Motion for Entry of Final Judgment. A hearing was held on April 19, 2005, at which counsel for Slagter stated:

> **"The only concern is that the language in the final judgment not require the assignment before we have had an opportunity to file the appeal, the motion for stay and the appropriate orders."**

On April 25, 2005, the Bankruptcy Court entered its Final Judgment and an order on a motion Slagter filed for a stay pending an appeal. The Bankruptcy Court granted the stay, but conditioned it upon Slagter posting a $200,000.00 bond within ten

(10) days following entry of the order. USCA5 1211

After the Bankruptcy Court rendered its Final Judgment awarding the Patent to Stonecraft, Slagter filed no objection to the Bankruptcy Court's findings under 28 U.S.C.§157(c)(1), which provides for *de novo* district court review of the bankruptcy court's findings of fact and conclusions of law.[3] Instead, Slagter lodged his appeal to the District Court under 28 U.S.C. §158(a), the section applicable to appeals from final judgments of the bankruptcy court. On May 13, 2005, Slagter designated his issues on appeal, which did not include any error on the part of the Bankruptcy Court in finding that the matter was a core proceeding or in entering final judgment rather than submitting proposed findings of fact and conclusions of law to the District Court.

Slagter did not post the $200,000.00 bond. For the following seven months, Slagter attempted to prevent enforcement of the Final Judgment by filing a personal Chapter 13 bankruptcy and numerous motions in the Bankruptcy Court and the District Court. On January 5, 2006, Slagter suggested for the first time that he desired the District Court to review the Bankruptcy Court's findings of fact and

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Rule 9033 of the *Federal Rules of Bankruptcy Procedure* requires that objections to proposed findings of fact and conclusions of law be filed within 10 days after service.

conclusions of law on a *de novo* basis pursuant to §157(a)(1). This was even after Slagter had filed his appellate brief with the District Court, **stating that a clearly erroneous standard applied to the Bankruptcy Court's findings of facts.**

On January 30, 2006, the Bankruptcy Court entered an Amended Final Judgment in which the Bankruptcy Court specifically required Slagter to execute the assignment of the Patent to Stonecraft within ten days after entry of the Amended Final Judgment. USCA5 1212 Slagter refused. On February 13, 2006, the Clerk of the Bankruptcy Court executed the assignment on Slagter's behalf as required by the Amended Final Judgment. The assignment was forwarded to the USPTO for recordation.

Shortly thereafter, Stonecraft consummated its Plan of Liquidation and filed a motion to dismiss Slagter's District Court appeal as moot. The District Court granted Stonecraft's motion and Slagter perfected his appeal to the Fifth Circuit Court of Appeals. It is significant that Slagter never mentioned §157(c)(2) in his principal brief filed in the Fifth Circuit, and certainly didn't mention the constitutionality of that subsection. Rather, only after Stonecraft asserted the implied consent doctrine in its brief did Slagter then question the constitutionality of §157(c)(2).

This typifies the conduct of Slagter throughout the litigation. Legal and factual positions are advanced or abandoned as convenient, and without any regard for consistency.

## SUMMARY OF THE ARGUMENT

In *Northern Pipeline Construction Company v. Marathon Pipeline Company*,[4] this Court held that Article III of the United States Constitution bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. In its analysis, this Court pointed out that the delegation of judicial power to bankruptcy judges lacked the procedural safeguards contained in the *Federal Magistrates Act* which permit district court judges to refer matters to a United States magistrate judge for initial determination, with the magistrate judge's recommendations being subject to *de novo* review by the district court.

After the *Northern Pipeline* ruling, Congress cured the constitutional defects contained in the 1978 *Bankruptcy Reform Act.* Congress authorized bankruptcy judges to enter final judgment with respect to "core" matters and to make proposed

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[4] 458 U.S. 50, 102 S. Ct. 2858 (1982)

findings of fact and conclusions of law to the district court with respect to "non-core" matters. Thus, a party has a right to *de novo* review in non-core proceedings. Slagter does not contest the constitutionality of the use of the bankruptcy court as an adjunct of the district court in this fashion. Slagter only contests the provision modeled after the *Federal Magistrates Act* authorizing bankruptcy judges to enter final judgment in non-core matters upon the consent of the parties.

This Court has previously held that such consent provisions are constitutional. This Court has also held that consent to entry of a final judgment by an adjunct court may be inferred from a party's conduct during litigation. The constitutionality of the consent provisions of 28 U.S.C. §157(c)(2), as well as whether such consent may be inferred from a party's conduct during litigation has been given sufficient guidance from this Court.

The Fifth Circuit properly applied the law to the facts of the case in ruling that the Bankruptcy Court had jurisdiction to enter the Final Judgment. This is not an appropriate case upon which certiori should be granted on these issues.

## ARGUMENT

### I.

### 28 U.S.C. §157(c)(2) Does Not Violate *Northern Pipeline* or the Constitution

Slagter suggests that 28 U.S.C. §157(c)(2), which permits parties to consent to entry of final judgment in non-core proceedings, "eviscerates the meaning of and violates the express finding of the United States Supreme Court in *Northern Pipeline v. Marathon*, 458 U.S. 50,102 S. Ct. 2858 (1982)." [5] Slagter's analysis of *Northern Pipeline* is flawed. A proper analysis of *Northern Pipeline* reveals that the first issue presented for review has a converse relationship to the constitutional infirmity found to exist in *Northern Pipeline*. It was the lack of a consent provision in the 1978 *Bankruptcy Reform Act* that substantially contributed to its violation of Article III, not the presence of one.

After holding in Section III of its opinion that Article III prohibits Congress from establishing a legislative court to exercise complete jurisdiction over state law based private rights, this Court turned to the question of whether it was constitutionally permissible for the bankruptcy court to act as an

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[5] Slagter Petition Page 17

"adjunct" to the district court. In its analysis of this issue, this Court noted that Congress does possess the authority to create legislative courts which are assigned certain fact finding functions as an adjunct to Article III courts.

First, this Court pointed out that it had previously approved the use of administrative agencies as adjuncts to Article III courts in matters involving the adjudication of Congressionally created rights, citing, *Crowell v. Benson.*[6] Second, this Court noted that it had sustained the use of adjunct fact finders "even in the adjudication of constitutional rights - so long as those adjuncts were subject to sufficient control by an Article III district court."[7]

Citing *United States v. Raddatz*,[8] this Court noted that it upheld the *Federal Magistrate Act*, which authorized district court judges to refer Article III functions to a United States magistrate. "[T]he magistrates proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for

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285 U.S. 22,52 S.Ct. 285 (1932).

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*Northern Pipeline* at 78-79.

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447 U.S. 667,100 S. Ct. 2406 (1980)

additional evidence."[9] This Court also noted that an overriding consideration in upholding the *Federal Magistrates Act* was that magistrate judges were appointed and were subject to removal by the district court and that:

> "there was no serious threat that the exercise of the judicial power would be subject to incursion by the other branches." "[T]he only conceivable danger of a "threat" to the "independence" of the magistrate comes from within, rather than from without, the judicial department."[10]

In contrast to the *Federal Magistrates Act*, the 1978 *Bankruptcy Reform Act* changed the relationship between bankruptcy referees and the district courts by making the new bankruptcy courts independent of the district courts. Thus, under the 1978 *Bankruptcy Reform Act*, parties no longer had access to a judicial officer independent from the legislative branch of government. Additionally, the jurisdiction of the bankruptcy court was substantially expanded beyond those matters which were incidental to administration

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[9] *Id.* at 79.

[10] *Id. at Footnote 30, citing Raddatz.*

of bankruptcy cases.[11] Not only did the 1978 *Bankruptcy Reform Act* vest complete judicial authority in the bankruptcy courts with respect to federally created public rights, it also vested such authority with respect to constitutional and private state law created rights. The 1978 *Bankruptcy Reform Act* impermissibly violated Article III because it granted the bankruptcy courts "powers far greater than those lodged in the adjunct approved in either *Crowell* or *Raddatz*."[12] Thus, this Court held that §241(a) of the 1978 *Bankruptcy Reform Act* vested too much judicial power in a non Article III adjunct court and was unconstitutional.[13]

In response, Congress enacted the *Bankruptcy Amendments and Federal Judgeship Act* of 1984 (BAFJA)[14] Congress specifically provided in BAFJA that the bankruptcy judges in each judicial district

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*Id.*

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*Id.* at 86.

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*Id.* at 87.

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H.R.5174, 98 Cong. 2d Session (1984), *reprinted in* 1984 U.S. Code Cong. and Ad. News (98 Stat. 333) *et seq.*

constituted a unit of the bankruptcy court.[15] Bankruptcy judges were appointed by the chief judge in the circuit in which each bankruptcy judge was to serve and not by Congress, thus removing any encroachment upon the judiciary by persons "outside the judiciary." BAFJA gave bankruptcy judges the authority to enter final judgment in core proceedings[16], which was consistent with this Court's finding in *Northern Pipeline* that congressionally created public rights may be determined by a non-Article III court. With respect to non-core proceedings, those proceedings which involve state law personal rights that could exist only outside the bankruptcy context, Congress followed the *Federal Magistrates Act*[17]. Bankruptcy judges may hear a non-core proceeding. However, the bankruptcy judge is required to submit proposed findings of fact and conclusions of law to the district court, which reviews *de novo* a bankruptcy judge's proposed findings and conclusions to which a party has timely and specifically objected.

BAFJA cured the impermissible grant of

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§104(a) of BAFJA (28 U.S.C. §151)

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28 U.S.C. §157(b)

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28 U.S.C. §§631-629 (1982)

jurisdiction to the bankruptcy court by limiting the ability of bankruptcy judges to enter final judgment and by giving parties a right to *de novo* review in non-core proceedings as to matters to which they specifically objected. These statutory provisions do not violate the express holding of *Northern Pipeline* and Slagter does not suggest that they do. Slagter does not contest the constitutionality of §157(c)(1). Rather, Slagter only contends that the consent provisions of §157(c)(2) are unconstitutional.[18]

This Court has held that such consent provisions are constitutional. Four years after *Northern Pipeline*, this Court held that the right to be heard by an Article III court is waivable. *In Commodity Futures Trading Commission v. Schor*,[19] this Court held that Article III does not confer an absolute right to have every type of claim heard by an Article III Court. Rather, the Court ruled that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver just as are other personal constitutional rights that dictate the

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[18] Ironically, §157(c)(2) does not give bankruptcy judges any greater judicial authority unless the parties consent. Thus, §157(c)(2) is more a grant of power to the parties than to the bankruptcy judge.

[19] 478 U.S. 833, 106 S. Ct. 3245 (1986)

procedures by which civil and criminal matters must be tried."[20]

In so holding, this Court condoned the use of consent in the bankruptcy context by stating:

> Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the **absence** of consent to an initial adjudication before a non-Article III tribunal was relied on as a **significant factor** in determining that Article III forbade such an adjudication.[21]

Slagter argues that *Commodity Futures* stands for the proposition that this Court is obligated to grant certiori to determine whether the consent provision contained in §157(c)(2) violates Article III. To the contrary, *Commodity Futures* clarifies the holding in *Northern Pipeline* that it is the absence of a provision permitting consent to final determination by a non-Article III court rather than the presence of one which violates the requirements of the Constitution. It

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*Id.* at 848-849

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*Id*, at 849 *emphasis added.*

would be an apparent waste of this Court's judicial resources to examine the constitutionality of giving a party an opportunity to consent to bankruptcy court jurisdiction in non-core matters when it was the lack of such a provision that provided the impetus for this Court's decision in *Northern Pipeline*.[22]

Respondent has been unable to locate a single circuit court opinion addressing the constitutionality of the consent provisions of §157(c)(2). Slagter only first raised the constitutionality of §157(c)(2) in two pages of his Reply Brief filed in the Fifth Circuit Court of Appeals without any substantive analysis. The Fifth Circuit did not even mention the issue in its less than two page opinion affirming the District's dismissal of Slagter's appeal as equitably moot. This is not an issue which, under the circumstances, this Court should grant a petition for writ of certiori.

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[22] Finally, it should be noted that the portions of this Court's opinion in *Commodity Futures* relied upon by Slagter pertains to the extent to which Congress can vest judicial power in non-Article III courts. Slagter does not contest placement of the judicial authority in the bankruptcy court under §157(c)(1), he only attacks the consent provision, which was dealt with in *Commodity Futures* in a completely different section of the opinion than the portions quoted by Slagter in his Petition.

## II.

## This Court Has Recently Held That Consent May Be Implied In Order to Comply With The Constitution.

Slagter's second question upon which he requests this Court to grant his Petition is based upon the argument that while §157(c)(2) does not provide for express consent, *Bankruptcy Rule* 7012(b) requires the consent to be express. Again, we turn to this Court's review of the *Federal Magistrates Act* in response to the question presented.

In *Roell v. Withrow,*[23] this Court held that consent to proceedings before a magistrate judge can be inferred from a party's conduct during litigation and does not need to be express. Like Rule 7012(b)(1) of the *Federal Rules of Bankruptcy Procedure*, Rule 73(b) of the *Federal Rules of Civil Procedure* requires specific written consent to entry of final judgment by a magistrate judge.[24] Likewise, the

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[23] 538 U.S. 580, 123 S.Ct. 1696 (2003)

[24] Rule 73(b)(1) states:

When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. §636(c). To signify their consent, the parties must jointly or separately

*Federal Magistrate's Act* requires express, written consent.[25] In *Roell*, the Fifth Circuit held consent must be express and can not be inferred from a party's conduct. In reversing the Fifth Circuit, this Court stated:

> "The virtue of strict insistence on the express consent requirement embodied in §636(c)(2) is simply the value of any bright line: here, absolutely minimal risk of compromising the right to an Article III judge. But there is another risk, and insisting on a bright line would raise it: the risk of a full and complicated trial wasted at the option of an undeserving and possibly opportunistic litigant.[26]

Citing *Commodity Futures* and *Raddatz*, this Court held that where a party is aware of the right to *de novo* review by an Article III court and waives that right through conduct, implied consent is sufficient

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file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

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28 U.S.C. 636(c)(2)

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*Roell v. Withrow* at 590

even though Rule 73(b) and §636(c)(2) require express written consent.[27]

In the instant case, Slagter was well aware of his right to *de novo* review of the Bankruptcy Court's findings of fact. In his Motion to Dismiss and Abstain Slagter expressly stated that **"Any decision of this court would be subject to review, before becoming final, by the district court."**

With knowledge of his right to *de novo* review, Slagter fully submitted himself to the jurisdiction of the Bankruptcy Court. After the motion for abstention was denied, Slagter proceeded to file a state law based, non-core counterclaim and a motion for summary judgment, both of which requested the Bankruptcy Court to enter judgment in his favor. Even after the Court entered its opinion on March 10, 2005 and Stonecraft filed its Motion for Entry of Final Judgment, Slagter made no objection to entry of final judgment by the Bankruptcy Court. He perfected his appeal pursuant to 28 U.S.C. §158(a) and treated the judgment as a final judgment on

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Slagter's assertion that the First Circuit Court of Appeals held in *Sheridan v. Michels*, 362 F.3d 96(1st Cir.2004) that express consent is required is incorrect. In *Sheridan*, the First Circuit stated that "In *In Re U.S. F. Corp.* 938 F.2d 1467(1st Cir. 1991) we decided that in certain circumstances, at least where the parties actions appear to speak as clearly as words, consent may be implied." *Id. at 101.*

appeal. It was not until early January, 2006, nine months after Stonecraft filed its Motion for Entry of Final Judgment, that Slagter first raised §157(c)(2).

Slagter argues that it was not necessary for him to raise the issue any earlier because the judgment was not enforceable until the Bankruptcy Court amended the Final Judgment in January, 2006. This argument is a red herring. The time at which the judgment becomes enforceable and the standard of review of the bankruptcy court's findings of fact are two separate and distinct matters. Further, Slagter must have believed that it was the intention of the Bankruptcy Court for the judgment to be final and enforceable when he filed a motion for a stay in the Bankruptcy Court and two additional motions for a stay in the District Court.

Finally, Slagter's argument that he believed the final judgment preserved his right to *de novo* review of the Bankruptcy Court's findings lacks credibility. In his brief in the District Court Appeal, Slagter asserted that a clearly erroneous standard of review applied to the Bankruptcy Court's findings. That brief was filed some three months prior to Slagter's first mention of §157(c)(2) in January, 2006. Thus, Slagter's request for *de novo* review **was an afterthought** since he first requested it after he filed his District Court brief asserting a clearly erroneous standard of review.

As the Fifth Circuit correctly held, Slagter impliedly consented to entry of final judgment by the Bankruptcy Court.

## III.
## There was no Error in the District Court's Dismissal of the Appeal.

Slagter asserts that the District Court erred when it dismissed his District Court appeal as equitably moot without first determining whether the Bankruptcy Court could enter a final judgment and whether the Bankruptcy Court should have mandatorily abstained.

Throughout his Petition for Writ of Certiori as well as in his arguments before the Fifth Circuit, Slagter points out that Stonecraft agreed in its response to his motion to abstain that Count II of the Amended Complaint was a non-core proceeding. Slagter ignores that after the Motion for Abstention was denied, he fully submitted himself to the jurisdiction of the Bankruptcy Court. Now he requests this Court to grant certiori on the issue of whether the jurisdictional issue should have been included in the District Court opinion dismissing his case as moot. However, that issue was considered by the Fifth Circuit, which found that the Bankruptcy Court did have jurisdiction to enter the final judgment. Slagter was not precluded from raising the issue in the Fifth Circuit and was not prejudiced by

any failure of the District Court to include a discussion of jurisdiction in its opinion.

It should be noted that it was **Slagter himself who first asserted that his appeal would be dismissed as moot** if he were not granted a stay pending appeal. In his Motion for a Stay Pending Appeal filed in the Bankruptcy Court as well as in his motions for a stay filed in the District Court, Slagter stated that he would be irreparably harmed if he were not granted a stay because **"It would render an appeal totally moot."** USCA5 295 Now, despite having convinced the Bankruptcy Court to grant him a conditional stay based upon that fact, Slagter argues that it would be "inequitable" to dismiss his appeal as moot.

However, the inequity lies in a party taking a position to induce a court to rule in his favor, only to abandon that position when it later proves to have been improvident. This specific type of inequity even has its own doctrine - the judicial estoppel doctrine, which is designed to protect the judicial system, not the litigants.[28] There are three requirements in the Fifth Circuit for application of the judicial estoppel doctrine; (1) the party is judicially estopped if his position is clearly inconsistent with a previous

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*In Re: Superior Crew Boats, Inc.*, 374 F. 3d 330 (5th Cir. 2004).

position; (2) the court must have accepted the previous position; (3) the inconsistency must not have been inadvertent. *Id.* at 335. In the instant case, all three elements of judicial estoppel are present. Slagter is judicially estopped from now asserting that the District Court erred when it dismissed his appeal as equitably moot.

## CONCLUSION

Slagter had no objection to the Bankruptcy Court entering its Final Judgment and only later requested the Bankruptcy Court to submit proposed findings of fact and conclusions of law to the District Court as an afterthought, nine months after the Final Judgment was entered. During that time, Slagter resisted enforcement of the Bankruptcy Court's Judgment by filing his own Chapter 13 Bankruptcy Petition in Michigan and numerous motions in the District and Bankruptcy Courts. When Stonecraft was finally able to enforce its Judgment, it consummated its Plan of Liquidation and Slagter's appeal was dismissed as moot, just as Slagter confessed it would be when he sought a stay of the Final Judgment.

No reversible error was committed by the lower courts. Stonecraft requests this Court to put an end to what has now become an eight year dispute by denying Slagter's Petition for Writ of Certiori.

Respectfully submitted,

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